



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: National Park Service--Late Payment Charges for  
Utility Services

File: B-222944

Date: October 23, 1987

### DIGEST

Payments on invoices by the National Park Service, Department of the Interior, submitted by an unregulated private electric utility company which is not governed by tariff approved by a state commission may be covered by the shorter payment term established by company policy rather than the longer payment term set forth in provision of the Prompt Payment Act, 31 U.S.C. § 3903(1)(B), where elements of implied contract, i.e., acceptance of electrical service with notice of company's policy are present.

### DECISION

The Regional Finance Officer (a certifying officer) of the National Park Service, Department of the Interior, Pacific Northwest Region requested our decision on whether he may certify for payment invoices for finance charges assessed by the Lincoln Electric Cooperative, Inc. (Cooperative), Davenport, Washington, a non-regulated utility, for late payments of monthly electric bills. For the reasons stated below, we hold that he should certify the finance charges for payment.

### BACKGROUND

This case arises because the Service is generally unable to pay Lincoln Electric's invoices within the time period the Cooperative's policy prescribes. The Cooperative provides electricity to National Park Service installations in the Coulee Dam National Recreation Area. Invoices are sent to Coulee Dam near the first of each month. Its policy is that payment is delinquent if not received by the 15th of the month. The Cooperative assesses a 1-1/2 percent penalty per month on a delinquent payment until paid with a \$1 minimum.

The Service usually cannot make payment by the 15th of the month because of the time it needs to complete administrative approval and payment procedures. Upon receiving an

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invoice, the park verifies that the services were received and checks the account to be charged. The invoice is then sent to the Regional Finance Office in Seattle where the expense is recorded and payment is made from the San Francisco Disbursing Center. Generally the Cooperative receives the payment during the first week of the month following the month in which the Service received the invoice.

Since the Cooperative has been receiving payments after the 15th of the month, it has been assessing finance charges against the Service pursuant to its policy. Along with its submission the Service enclosed 21 invoices which it has paid except for the finance charges.

#### DISCUSSION

This case presents the question of which of two provisions of the Prompt Payment Act, 31 U.S.C. § 3903(1)(A) or 31 U.S.C. § 3903 (1)(B), applies to the Service's invoice payments. With exceptions not here applicable, 31 U.S.C. § 3902 requires agencies to pay an interest penalty to business concerns if they do not pay for delivered items of property or services within 15 days after the "required due date" as that term is defined by regulations prescribed pursuant to 31 U.S.C. § 3903. Section 3903 directs the Office of Management and Budget to prescribe regulations to carry out section 3902. It states that those regulations must provide that the required payment date is "the date payment is due under the contract for the item of property or service provided" (Subparagraph (1)(A)) or if a specific payment date is not established by contract, then the required payment date is 30 days after a proper invoice for the amount due is received (Subparagraph (1)(B)).

The submission raises the question of whether the Cooperative's declared payment date of the 15th of the month has been "established by contract" for purposes of 31 U.S.C. § 3903(1). If it has, then the Service's payments are delinquent and it owes the Cooperative an interest penalty. Conversely, if there is no contract between the parties establishing a payment date, then the Service's payments are due as prescribed by the Prompt Payment Act--(30 days after an invoice is received)--with an additional 15-day grace period before interest may be assessed. If this is the case, then the Service has complied with the terms of the Prompt Payment Act.

The finance officer informs us that electricity to most of the National Park Service installations within his area has been provided by this Cooperative for many years. In preparation for his submission to this Office, the finance

officer requested copies from the Cooperative of any contracts or "tariffs" supporting the late payment charges appearing on the invoices. The Cooperative's office manager responded on March 18, 1986 with a copy of its formal policy document for small commercial service customers, effective October 20, 1983, which, on the second page, states the late payment charges as described before. He also points out that on the back of each monthly statement, the same late payment terms are set forth. Finally, we note that the same late payment terms also appear on three old "agreements for purchase of power," the latest of which is dated April 1, 1971, which were included in the submission. We do not suggest that any of these last three documents themselves constitute the requisite "contract" which supersedes the terms of the Prompt Payment Act. We mention them only because they are additional evidence that the Service has long had notice of the Cooperative's late payment policy.

As the finance officer notes, we considered a similar question in 63 Comp. Gen. 517 (1984). In that case we were called upon to decide whether the Social Security Administration's (SSA) Texas field offices were liable for late payment charges assessed by the General Telephone Company of the Southwest (GTE) on its bills for telephone services, in the absence of a formal agreement between SSA and GTE. GTE assessed the late payment charges under the terms of the Texas General Exchange Tariff approved by the Texas Public Utility Commission. SSA was able to make its payments within the more liberal "no contract" period of 31 U.S.C. § 3903(1)(B), but not within the period designated by the tariff. We found that for Prompt Payment Act purposes, the terms of the Texas General Exchange Tariff must be regarded as being incorporated into the contract for telephone services between SSA and GTE. Consequently, the payment period was governed by the tariff's terms pursuant to 31 U.S.C. § 3903(1)(A), rather than the more liberal terms of 31 U.S.C. § 3903(1)(B). We then held that since SSA had not paid GTE's invoices within the period the tariff specified, it owed the late payment charges GTE assessed.

Also, after receiving the Park Service's submission, we issued our decision, 65 Comp. Gen. 842 (1986). In that case, the approved tariff did not provide for a late payment charge. In holding that the government was liable for Prompt Payment Act late payment penalties, we applied the "no contract" required payment date specified in 31 U.S.C. § 3903(1)(B).


The finance officer questions whether our holding in 63 Comp. Gen. 517 is applicable in the present case. As distinguished from that case (and 65 Comp. Gen. 842), the

utility services in question here are provided by private companies and cooperatives that are not regulated by state commissions. The question is whether, in the absence of a state-approved tariff, the payment terms enunciated in an unregulated company's policy statements can, for purposes of the Prompt Payment Act, be regarded as part of a binding utility services contract between the government and the utility company.

We think that it can, under traditional principles of contract law. A "contract implied in fact" arises even in the absence of a formal written contract where the actions of the parties, according to the ordinary course of dealing and common understanding, show a mutual intent to be bound by certain terms. In other words, any conduct of one party from which the other party may reasonably draw the inference of a promise is effective in law as such, and the conduct of the parties is to be viewed as reasonable men would view it, to determine the existence of a promise.

Under these principles, there is an implied acceptance by the Park Service of the Cooperative's payment terms. Lincoln Electric's payment policy is clearly printed on the back of the invoices for which finance charges are being claimed. Printed on the front is "SEE REVERSE SIDE FOR PAYMENT TERMS" in capital letters. Following the invoices, Lincoln sent the finance office a copy of its formal late payment policy statement, which, as mentioned earlier, indicates that the policy was effective on October 20, 1983. Thus, the Service has been using the Cooperative's electrical service with full knowledge of its payment policy. Applying the standard of "the ordinary course of dealing and common understanding," by such conduct the Service is presumed to accept the terms stated on the invoice. Accordingly, we find that a specific payment date has been "established by contract" for purposes of determining the required payment date under 31 U.S.C. § 3903.

Unless the Service is able to negotiate modified payment terms with the Cooperative, which takes into account the Service's difficulties in complying with the invoice terms as written, it must continue to pay late payment charges to the Cooperative or attempt to find a new supplier.

  
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